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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1054

THE STATE NATIONAL BANK OF MARSHALL,
IN LIQUIDATION,
Petitioner,

vs.

W. D. TITTLE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND BRIEF IN SUPPORT THEREOF.

S. P. JONES,
FRANKLIN JONES,
C. A. BRIAN,
ERNEST F. SMITH,
Counsel for Petitioner.

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MAY IT PLEASE THE COURT:

The petition of THE STATE NATIONAL BANK OF MARSHALL, IN LIQUIDATION, respectfully shows this Honorable Court:

A

Summary Statement of the Matter Involved

Petitioner, a national bank in liquidation, sued respondent on a promissory note of December 31, 1941, as evidenced by two renewals. Trial was to a jury, pursuant to whose verdict the trial court entered a money judgment for petitioner. The Texas Appellate Courts reversed, and held,

in effect that the note was paid by reason of a verbal agreement between petitioner's Vice President, Thomas, and respondent. From the beginning, petitioner has contended that, under the jury verdict and implied findings of the trial court, the agreement was inoperative to effect payment of the note because it was in violation of the National Banking Laws, and the federal policy announced thereunder; that Thomas' fraud and deep financial interest in a Brick Co., whose funds he agreed to apply on the note, destroyed any implication of notice to the Bank through him. That the Bank had no actual notice, and received no benefit from the transaction.

B

Basis of Jurisdiction

1. Petitioner contends that it was denied a right, privilege or immunity, that it specially set up and claimed, under a statute of the United States; so that jurisdiction exists under *28 U. S. C. A.*, Section 344, subsection (b).

2. Petitioner contends it was denied recovery on a promissory note, unqualified on its face, by reason of a secret verbal qualification that was in contravention of the National Banking Laws (*U. S. C. A. Title 12*), and the federal policy announced thereunder (*D'Oench Co.* v. *F. D. I. Co.*, 315 U. S. 447, 86 L. Ed. 956). That the State Court held petitioner charged with its Vice President's knowledge of a transaction he fraudulently consummated for his own financial gain; whereas the federal decisions hold to the contrary.

3. The Judgment of the Texas Supreme Court was dated November 15, 1944 (R. 99), and became final upon denial of Motion for Rehearing on December 20, 1944 (R. 98).

4. In the trial court, respondent Tittle denied liability on a promissory note, which was unqualified on its face, by allegations of a verbal agreement between him and petitioner's Vice President, W. M. Thomas (R. 7). The substance of his averments was, that a short time before respondent executed his note, the National Bank Examiner had criticised the line of credit extended by the Bank to Waterman Brick & Tile Co., demanding that the same be reduced to the limit authorized by law (R. 7). That at the time, the Brick Co. had a large overdraft with the Bank for checks drawn on it, and paid by the Bank when the Brick Company's deposits were insufficient to cover the checks. That Thomas told respondent that the proceeds of the note he made would be used to take up the checks which the Brick Co. had drawn on the Bank, and which had not been charged to its account because of the insufficiency of its deposits (R. 8). That upon respondent agreeing for the proceeds of his note to be so applied on the Brick Company overdrafts, Thomas acting for the Brick Co. and the Bank (R. 7), agreed to apply the future proceeds of a certain government contract held by the Brick Co. on respondent's note until it was discharged; but although receiving such funds as deposits of the Brick Co., the bank failed to apply the same on the note (R. 7-8).

By supplemental petition, both by exceptions and pleas to the merits, petitioner averred that the verbal arrangement pleaded by respondent operated so as to cause the records of the bank to reflect that respondent's note was an unqualified asset of the bank; whereas if the agreement were enforced, the transaction would have amounted to a means of either advancing the Brick Co. additional excessive loans, or making the records of the bank untruthfully indicate that the excessive loans of the Brick Co. were not

as great as they were (R. 15-16). That Thomas being financially interested in the Brick Co., and to receive a benefit from the transaction, could not act as agent for it and the bank, due to adversity of interest (R. 17, 23); that the agreement was beyond the power and authority conferred upon Thomas by the National Banking Laws (R. 17-18); and that the agreement was a plan or scheme to evade the applicable provisions of the National Banking Laws, and against public policy (R. 19-20). That the transaction constituted a personal loan to Thomas by Tittle (R. 22).

Petitioner excepted to the action of the Trial Court in overruling its exceptions to respondent's answer (R. 33), and moved for an instructed verdict, because, among other reasons, respondent aided Thomas, by the agreement, etc., in the violation of the National Banking Laws and the federal policy announced thereunder, and could not benefit by such conduct (R. 33). The Trial Court overruled petitioner's motion for an instructed verdict, and later entered a judgment in favor of petitioner pursuant to the verdict of the jury (R. 45).

The Texarkana Court of Civil Appeals reversed and rendered the Judgment of the Trial Court (R. 59), following which petitioner seasonably presented a motion for rehearing containing all of the contentions urged herein (R. 60), and which was overruled (R. 75). It brought forward the points involved by way of Application for Writ of Error to the Texas Supreme Court (R. 76), which was granted (R. 81). That court affirmed the Judgment of the Texarkana Court of Appeals, and by Motion for Rehearing, and Motion for additional finding of facts lodged there (R. 88, 95), petitioner again urged all of the federal questions presented, but such Court overruled both motions (R. 98).

5. The following cases are believed to sustain the jurisdiction of this court to review the decision complained of:

Logan County Bank v. *Townsend*, 139 U. S. 67, 72-73;
Rankin v. *Barton*, 199 U. S. 228, 50 L. Ed. 163, and Annotations;
Seabury v. *Green*, 294 U. S. 165, 79 L. Ed. 836, 837;
Yates v. *Jones National Bank*, 206 U. S. 158, 51 L. Ed. 1002.

6. The substantiality of the questions involved is readily apparent from the fact that petitioner was denied recovery on respondent's note, solely by reason of the holding that the conduct of Vice President Thomas and respondent, in making the verbal arrangement about the discharge of the note, was not in violation of the National Banking Laws, or federal policy announced thereunder. Again, the sole means of binding petitioner by said verbal arrangement was by charging it with knowledge of Thomas' conduct under the "sole actor" doctrine, as applied to a national bank officer. The Texas Supreme Court refused to follow the federal decisions,[1] on these questions, and rendered judgment against petitioner by applying the rule announced in a Texas case,[2] that we believe is not in accord with the federal decisions.

Additional substance is given the question presented, when it is remembered that upon liquidation of petitioner bank, it was found that W. M. Thomas had placed among its assets better than $60,000.00 worth of so-called "accom-

[1] *Bank* v. *Miller*, 229 U. S. 517, 57 L. Ed. 1310.
Federal Deposit Ins. Co. v. *Vest*, 122 Fed. (2d), 765.
Cert. denied 314 U. S. 696, 86 L. Ed. 577.
Am. Surety Co. v. *Pauley*, 170 U. S. 133, 156, 158-159.
D'Oench Co. v. *F. D. I. Co.*, 315 U. S. 447, 86 L. Ed. 956.
Dietrick v. *Greaney*, 309 U. S. 190, 84 L. Ed. 694, 697, et seq.

[2] *Goldstein* v. *Union Natl. Bank, et al.*, 109 Tex. 555, 213 S. W. 584.

modation notes", such as respondent contends his was (R. 161). Necessarily, the decision of this case will determine whether these notes, absolute on their face, may be sworn away by alleged verbal agreements between Thomas and the respective makers, which could be known to the bank only through Thomas.

C

Questions Presented

Respondent's note was unqualified on its face. By his action and that of Thomas alone, it was placed without qualification among the assets of the bank as a personal liability of respondent. Respondent swore that the purpose of this was to "take care of" an overdraft of the Brick Co. which *could not be shown* on the books of the bank (R. 134, 135, 136, 139-40). But from its future deposits with petitioner, the Brick Co. was yet to discharge the obligation thus concealed by respondent's note transaction (R. 123, 139-140). The jury found that when Thomas agreed to apply the Brick Co. funds on respondent's note, Thomas did not intend to perform the agreement (Issue 4, R. 39); thus Thomas was acting fraudulently toward the Bank. Thomas had deep financial interest in the Brick Co. (R. 151; 171), but the Texas courts held the bank responsible for his failure to apply its funds on the note, and held his knowledge to be that of petitioner. We urge the following questions, or matters, for consideration:

(1) Respondent consciously aided Thomas to place the former's unconditional note among the assets of the bank, in lieu of an overdraft of the Brick Co., which could not (without disclosing a violation of national banking laws) be shown upon the books of the bank. Yet, under respondent's contention, the primary obligation on the note was that of the Brick Co., in that it was to be discharged solely

from funds of the Brick Co., which were to be deposited in the bank in the future (R. 123). By thus aiding Thomas to conceal the existing obligation of the Brick Co., through executing a note in his name, but which was to be paid by the Company, Respondent aided or abetted Thomas in making a false entry in the report or statement of the bank, contrary to *12 U. S. C. A.*, Section 592. Also he aided Thomas in receiving a fictitious obligation in order to evade the National Banking Act, in violation of *12 U. S. C. A.*, Sec. 591. The note was carried through at least one bank examination, at which time the examiner required the payment of a different and unconcealed excessive loan of the Brick Co. (R. 161, 171).

(2) In the foregoing paragraph it is assumed that when Respondent executed his note the overdraft was an existing obligation of the Brick Co.; although carried as a cash item, rather than being charged to its account. If it was not then a Brick Co. obligation, the transaction between respondent and Thomas operated to extend a loan of $3,000.00 by the bank to the Brick Co. through respondent. This, in that respondent was never to pay the note under the arrangement, or at least, was to pay it only if the Brick Co. failed so to do (R. 123, 135). Consequently, the Brick Co. was the primary borrower (through Tittle), and respondent's liability was secondary. Respondent thus participated in a scheme whereby the Brick Co. (then owing within $500.00 of its legal limit) procured an excessive loan in contravention of *12 U. S. C. A.*, section 84. Respondent aided Thomas to conceal the loan by reason of the verbal agreement.

(3) The facts found by the jury, and impliedly found by the trial court in aid of his judgment,[3] establish that

[3] See Texas Rules of Civil Procedure No. 279, Appendix A and B; also Vernons Tex. Rules of Civ. Proc., p. 296.

Respondent's note transaction was for the sole purpose of loaning Thomas the proceeds of the note personally (Issues 14-17, R. 41-42). The undisputed evidence showed Thomas did not attempt to bind the bank by the verbal agreement, or make it on the Bank's behalf (R. 128, 127, 150-51). So considering the facts, Tittle first borrowed the money from the bank, and then loaned it personally to Thomas under the verbal agreement. Otherwise, Tittle acted as the instrument through which Thomas indirectly borrowed money from his own bank, in violation of *12 U. S. C. A.*, section 375a. In neither event, could respondent set up the verbal agreement as a defense to the bank's suit on the note.

(4) The findings of the jury and trial court, together with the undisputed facts, establish that Thomas was transacting his personal business or that of the Waterman Brick & Tile Co. in making the verbal arrangement with Respondent. That he acted in fraud of the bank. In these circumstances, his interest was so adverse to the bank, as that he dealt with it at arm's length, and consequently his knowledge of the transaction was not imputable to the bank, even under the "sole actor" doctrine.

(5) The contemporaneous oral argeement changing the time and manner of paying the promissory note violated the parol evidence rule.

D

Reasons Relied On for the Allowance of the Writ

In denying petitioner recovery, the Texas Supreme Court deliberately ignored the applicable decisions of this court, and which, it is believed, are contrary to that court's decision. It did not pay the decisions of this court the doubtful homage of mentioning them, but considered petitioner foreclosed on the federal questions presented by the Texas

Court's decision in the *Goldstein Case*,[4] of the vintage of 1919. The very transaction upheld in that case was made unlawful on June 16, 1933 by an act of Congress (*48 Stat. 182, 12 U. S. C. A. 375a*). And in interpreting this statute, the Sixth Circuit Court of Appeals conceived one of its principal purposes to be the decrease of the hazard of one-man bank control (*122 Fed. (2d) 765, 767*). The Circuit Court opinion was based on the reasoning of the decision of this court in *Deitrick* v. *Greaney*, 309 U. S. 190, 84 L. Ed. 694, as later elaborated in *D'Oench Co.* v. *F. D. I. Corp.*, 315 U. S. 447, 86 L. Ed. 956.

Again, this court refused to charge a National Bank with the knowledge of its dominating officer under the "sole actor" doctrine, where such officer had a financial interest in the transaction involved that was adverse to the Bank (*Bank* v. *Miller*, 229 U. S. 517, 57 L. Ed. 1310). The Texas courts held to the contrary in the present case.

We conceive that the institution of banking is affected with such public interest, as that the decisions of this court interpreting the National Banking Act, banking practices thereunder, and the legal principles by which the conduct of banking officers are to be measured, should be uniform throughout the States. It is our sincere opinion, that if the State decision in this case be not reviewed, the National Banking Act, and the policies to be enforced thereunder, will be differently construed in Texas than elsewhere in the United States; at least until this court does grant a writ in some Texas case and change the State Supreme Court's erroneous conception of the National Banking laws.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

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[4] *Goldstein* v. *Union National Bank, et al.*, 109 Tex. 555, 213 S. W. 584.

this Honorable Court, directed to the Supreme Court of Texas, commanding that court to certify and send to this Court for its review and determination, on a day certain be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. A-184, *The State National Bank of Marshall, in Liquidation, Petitioner*, v. *W. D. Tittle, Respondent*, and that the said judgment of the Supreme Court of Texas may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE STATE NATIONAL BANK OF MARSHALL,
IN LIQUIDATION,
By JONES & JONES,
Marshall, Texas,
S. P. JONES,
FRANKLIN JONES,
C. A. BRIAN,
ERNEST F. SMITH,
Counsel for Petitioner.
S. P. JONES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1054

THE STATE NATIONAL BANK OF MARSHALL, In Liquidation,

Petitioner.

vs.

W. D. TITTLE

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The opinion of the Texas Supreme Court is reported in 183 S. W. (2d) (Adv.) 720, and that of the Texas Court of Civil Appeals in 179 S. W. (2d) 1010.

II

Statement of the Case

We adopt by reference paragraphs A, B4 and C of our foregoing petition. Most of the questions presented center around the conduct of respondent and Vice President Thomas on December 31, 1941. Without question, the sole

written evidence of that conduct was the execution by respondent of a promissory note for $3,000.00 with interest at 8%, payable to petitioner 30 days after date (R. 128-29); the issuance of a deposit slip showing that the principal of the note was placed in the deposit account of respondent on the same date (R. 131); and the issuance of a check against respondent's account for the amount of the note, payable to W. M. Thomas, and bearing equal date with the note and deposit slip (R. 132). Contemporaneously, Thomas signed a promissory note for the same amount and rate of interest, made payable and delivered to respondent (R. 123, 131). The check was stamped paid January 2, 1942 (R. 132), on which date a deposit of $6,000.00 was made in the W. M. Thomas account (R. 163).

Thomas testified that the transaction amounted to what the written evidence suggested, a purely personal loan to him by Tittle, the amount of which Tittle borrowed from the Bank (R. 150), and we contend the jury so found (Issues 14 through 17, R. 41-42). That there was no agreement whatever about the Bank holding any funds out of any Brick Co. contract, and to quote him:

> "Q. Did you in this transaction with Mr. Tittle at any time make any agreement on the part of the Bank that the Bank would hold money out of funds that the Brick Company was receiving out of the contract and apply on Tittle's note?
>
> A. I did not; I don't think a bank could do that" (R. 150-51).

Further, Thomas testified that he had put between $25,000.00 and $30,000.00 more into the Waterman Brick & Tile Co. than he had realized therefrom; that the investment was a purely personal transaction and that the bank had no interest in the same; that at the time of the transaction with respondent Thomas had a financial interest in the Brick Co. (R. 151). In fact, on January 20, 1942, the bank examiner

reported there was a debt to Thomas by the Brick Co. in the sum of $12,000.00, which debt Thomas had verbally subrogated to the debt that the Brick Co. owed the petitioner (R. 171).

Tittle, a small groceryman (R. 126), testified to the following remarkable transaction with Thomas: The latter called him into his office and stated that the Waterman Brick & Tile Co. had a large overdraft in the bank, and that Thomas "wanted me (Tittle) to loan the bank $3,000.00 to take up the overdraft, wanted it five or six days" (R. 123). That Thomas looked for money every day from a government contract (of the Brick Co.) which would be applied on the note, and again quoting: "He (Thomas) said I would never have to pay it" (R. 123). Tittle further testified that his note and the check to Thomas were made out by Thomas, and thereafter he was given a deposit slip and Thomas' note, in the nature of a guaranty (R. 124).

On cross-examination, Tittle testified that Thomas had told him beforehand that he had an interest in the Waterman Brick & Tile Co. (R. 127); that he owned a lot of stock and was operating it, or aiding in its operation (R. 157). Also, that nothing was said in the conversation to indicate that the Bank was going to do anything with the Brick Company's funds (R. 127-128), and particularly referring to that portion of the conversation about applying the Brick Co. funds on the note, we quote respondent:

> "Q. As you have said, that (was) no part of the agreement and nothing was said about the Bank taking the Brick Company's money and putting it on the note?
>
> A. He said the Bank wanted to borrow the money, and the first money that came in would apply it on the note.
>
> Q. He didn't say the Bank would apply it on the Note?
>
> A. He didn't say who would apply it.

Q. He didn't say the Bank would apply it?
A. No, sir." (R. 128).

Tittle also testified that he knew he was giving the Bank an instrument that on its face showed an absolute obligation for him to pay it, and which could be negotiated "just like greenbacks" (R. 129). That he did not trust Thomas to make any changes on the note, and knowing none would be made thereon, turned the same aloose on the Bank as an obligation perfectly valid on its face (R. 129). That he knew of the existence of bank examiners, who examined banks and listed the assets and liabilities thereof (R. 130). On the question as to Respondent's purpose in executing the note, under the verbal agreement, we quote him as follows:

"Q. Then you were giving a note to take up an overdraft the Bank couldn't carry on their books?
A. Yes, sir" (R. 135). * * *

"Q. You knew that when you gave that bank that note that it couldn't collect it, that it had gotten a fraudulent instrument to make its books show they didn't have an overdraft of the Waterman Brick & Tile Company?
A. I didn't know; he told me — wanted to get $3,000.00 to take up an overdraft.
Q. And couldn't carry it on the books?
A. Yes, sir.
Q. And had to have some assets to take the place of the overdraft?
A. Said they wanted to borrow the money." (R. 135-36) * * *

"Q. You knew this note was used to take up the overdraft, what he was to have used the money for?
A. What he told me he wanted to borrow the money for.
Q. You knew the note would go in as a part of the assets of the bank?
A. Yes, sir.
Q. You knew the overdraft was being wiped out by the note?

A. Yes, sir.

Q. You knew the note with your trade with Thomas, was not to be paid by you?

A. He said I wouldn't have to pay it.

Q. You knew the bank's records had been altered to show the overdraft taken up by the note didn't you?

Mr. Abney: If he admits the record was altered——

(Interrupted)

Mr. Jones: Kill the question.

Q. You know (knew) the bank records would show the note as an asset instead of an (the) overdraft?

A. Yes, sir'' (R. 139-40).

In view of the fact that the jury resolved the issues of fraud in procuring renewals of the original note against petitioner, we do not treat the evidence on that subject. The striking down of the renewal notes left unimpaired the obligation of respondent to discharge the unpaid portion of the debt created December 31st, 1941, if our contentions are correct.

H. F. Holland, assistant cashier of petitioner, testified from its records that the Waterman Brick & Tile Co. had a balance of $7.70 in its account on December 31, 1941, having no overdraft in the bank (R. 140). That the Bank had paid some of respondent's checks, but was carrying the same as cash items, and had not charged them to the account of the Brick Co. (R. 140-41). Holland testified that he knew where the funds secured from Tittle on the note went; that they did not go to take up any of the checks of the Waterman Brick & Tile Co. that were being carried as cash items on December 31, 1941, and did not go to the Brick Co. account (R. 141, 162); that the ''cash item checks'' were paid by deposits of the Brick Co. realized from the sale of its products (R. 162). That there were no credits of the Wa-

terman Brick & Tile Co. to Thomas until January 19th, 1942 (R. 162).

Holland further testified that the Bank had what is known as a Discount Committee, which met whenever necessary, and had the function of passing upon credits and applications, as well as loans already made (R. 162). The Committee was composed of the President, Cashier and two directors appointed by the Board every six months (R. 169), and had the duty of submitting in writing a report of all notes discounted etc. by the bank at each regular meeting of the Board, and which directors approved or disapproved such report (R. 169).

John E. Harter, one of the directors, served on this Committee and testified that it had fixed a limit of $500.00 to $1,000.00 for the bank officials to make loans on (R. 165), the Committee passing upon the credit of applicants for larger amounts. On cross examination, he testified that he was sure respondent had a line of credit before Thomas made the loan in question (R. 166). The Board of Directors of the Bank met the 20th of each month (R. 168).

On January 1, 1942, until the bank closed in July, it was never brought to the attention of the Discount Committee or the Board of Directors that Respondent had loaned money to the Bank, according to Harter (R. 165). Indeed, Holland testified that there had never been a transaction in the history of the bank where money was loaned to it as testified by respondent herein, the method of borrowing as indicated by the minutes of the Board of Directors in 1929, being the only one known to him (R. 161). That at the time respondent claims to have loaned petitioner the money, it had the means of using some $300,000.00 in cash (R. 168). Roy Marcom, Vice President and Cashier of the Marshall National Bank, and with many years experience both as banker and examiner, testified that it was not

customary for a National Bank to engage in a transaction such as that narrated by respondent (R. 147 et seq.).

We regret that the opinion of the Texas Supreme Court has, to our mind, made necessary the preceding comprehensive statement of the facts. It will be seen that such Court made no effort to state the facts, further than the statement that: "Tittle's testimony substantially supported his allegations (Op. 183 S. W. (2d) 721)." We sincerely believe that many of the facts above summarized are in conflict with Tittle's allegations. We respectfully pointed this out to the Texas Supreme Court by Motion for an enlargement of the opinion dealing with the facts, which Motion was denied without opinion (R. 98).

III

Specification of Errors and Summary of the Argument (Presented as Points)

Point One

THE TEXAS SUPREME COURT ERRED IN HOLDING THAT THE SECRET VERBAL AGREEMENT OF DECEMBER 31, 1941 DID NOT OPERATE TO CONCEAL AN EXISTING EXCESSIVE LOAN TO THE BRICK CO. BY PETITIONER, OR TO CREATE AND CONCEAL A NEW EXCESSIVE LOAN TO IT IN VIOLATION OF THE TERMS AND POLICIES OF THE NATIONAL BANKING ACT; AND THAT THE FAILURE OF PETITIONER TO APPLY THE BRICK CO. FUNDS ON RESPONDENT'S NOTE OPERATED TO DISCHARGE IT.

Point Two

THE SUPREME COURT OF TEXAS ERRED IN HOLDING AS A MATTER OF LAW THAT THOMAS ACTED AS THE AGENT OF THE PETITIONER IN MAKING THE VERBAL AGREEMENT OF DECEMBER 31, 1941, DESPITE THE UNDISPUTED EVIDENCE, THE VERDICT OF THE JURY, AND THE IMPLIED FINDINGS OF THE TRIAL COURT, ALL TO THE CONTRARY.

Point Three

THE TEXAS SUPREME COURT ERRED IN HOLDING PETITIONER WAS CHARGED WITH KNOWLEDGE OF THE VERBAL

AGREEMENT OF DECEMBER 31, 1941, UNDER THE "SOLE ACTOR" DOCTRINE; NOTWITHSTANDING THE JURY VERDICT AND IMPLIED FINDINGS OF THE TRIAL COURT TO THE EFFECT THAT THOMAS ACTED IN A PURELY PERSONAL CAPACITY IN MAKING THE AGREEMENT, IN FRAUD OF PETITIONER, AND THAT IT WAS TO HIS DEEP FINANCIAL INTEREST NOT TO DIVULGE THE EXISTENCE OR NATURE OF THE AGREEMENT TO PETITIONER.

Point Four

THE TEXAS SUPREME COURT ERRED IN HOLDING THAT THE VERBAL AGREEMENT OF DECEMBER 31, 1941, MADE CONTEMPORANEOUSLY WITH THE EXECUTION OF RESPONDENT'S NOTE, DID NOT CHANGE THE MANNER AND TIME OF PAYMENT OF THE ORIGINAL NOTE, IN VIOLATION OF THE PAROL EVIDENCE RULE.

ARGUMENT

Point One (Restated)

THE TEXAS SUPREME COURT ERRED IN HOLDING THAT THE SECRET VERBAL AGREEMENT OF DECEMBER 31, 1941 DID NOT OPERATE TO CONCEAL AN EXISTING EXCESSIVE LOAN TO THE BRICK CO. BY PETITIONER, OR TO CREATE AND CONCEAL A NEW EXCESSIVE LOAN TO IT IN VIOLATION OF THE TERMS AND POLICIES OF THE NATIONAL BANKING ACT; AND THAT THE FAILURE OF PETITIONER TO APPLY THE BRICK CO. FUNDS ON RESPONDENT'S NOTE OPERATED TO DISCHARGE IT.

Argument and Authorities under Point One

On December 31, 1941, the Waterman Brick & Tile Co. owed petitioner bank $14,406.46, and the legal limit that the bank could loan to one customer was $15,000.00 (R. 105). Some time before, H. F. Holland, holding a position in the bank subordinate to Vice President Thomas, had called to the attention of Thomas that there were checks against the Brick Co. in the drawer which had not been charged to it, whereupon Thomas "got me (him) told that it wasn't any of my business; that he was seeing after it himself and from then on I let him see after it" (R. 105-106). Holland never reported this to the directors (R. 106). Thenceforward Holland's knowledge of the Waterman ac-

count was casual, but Thomas supposedly authorized the bank employees to pay the checks which could not be put on the Waterman account because it would be shown over the limit, and the checks would be carried as cash items (R. 106).

On December 31, 1941, there were checks against the Brick Co. in the aggregate sum of more than $8,000.00, carried as unidentified cash items, and not charged against its account (R. 116). In this situation, respondent freely admits that he gave the controversial note "to take up an overdraft that the bank could not carry on their books" (R. 135-36); that he knew the bank records would show the note as an asset instead of the overdraft (R. 139-40); and that the note was not to be paid by him, but from funds received by the Brick Co. from a government contract (R. 123-24).

Respondent knew of the customary business method of listing assets and liabilities (R. 126), and likewise knew of the existence of bank examiners, and of their custom of examining banks and listing their assets and liabilities (R. 130). Should we disregard the undisputed fact that the proceeds of respondent's note were not applied on the Brick Co. checks (R. 141, 162), this is the situation: Thomas was improperly carrying the checks as cash items, rather than showing them as overdrafts (*Bacon* v. *U. S.*, 97 Fed. 35, 38 C. C. A. 37, 45 and see 85 A. L. R. 832). To charge them against the Brick Co. account as overdrafts, would show an indulgence beyond the liability limits fixed by 12 U. S. C. A. Section 84 (*McCormick* v. *King, et al.*, 241 Fed. 737, 154 C. C. A. 439, 445). The natural consequence of respondent's agreement was to substitute his note, as an apparently unqualified asset, in order to remove the checks as cash items, or in his language to "take up an overdraft". But the fraud and viciousness in the scheme arise from the fact that respondent's note was not, under his

verbal agreement, *an unqualified asset*, but to the contrary constituted an obligation to be primarily discharged by the Brick Co.

The sole basis of distinction that the courts below made between the present situation, and that presented in the *Deitrick*[5] and *D'Oench*[6] cases, is that respondent testified in effect that he was to pay his note, *if* the Brick Co. funds did not discharge it. Such Appellate Courts both seem to arrive at this conclusion, by reason of the fact that the Brick Co. incurred no liability by the transaction, or in the words of the Texas Supreme Court: "—never became liable on the note as an undisclosed principal." The court doubtless overlooked the earlier parts of its opinion to the effect that the Brick Co. agreed through Thomas for its funds to pay the note, and that Respondent would never be called upon to pay it (183 S. W. (2d) Adv. 720-721). The Texas Courts both concluded that the note was paid by the deposit of Brick Co. funds with petitioner. Most certainly, it will not be suggested that the bank has lost the debt through its failure to enforce it against the funds of a party not liable thereon. So to suggest would place the bank in the position of having to either apply the Brick Co. funds on the loan, and lose them on a subsequent claim of the Brick Co. that it did not owe the debt, or of failing to apply the funds on the loan, on penalty of the court holding that the note was paid thereby. A more shattering blow to general confidence in the institution of banking could hardly be imagined.

Conceding that the Brick Co. was not liable on the note "as undisclosed principal," it nevertheless became liable on the debt evidenced by the note, through the verbal agreement that amounted to an assumption thereof (See 2 Am.

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[5] *Deitrick* v. *Greaney*, 309 U. S. 190, 84 L. Ed. 694, 697 et seq.

[6] *D'Oench Co.* v. *F. D. I. Co.*, 315 U. S. 447, 86 L. Ed. 956.

Jur. Agency Suppl. Sec. 397; 130 A. L. R. 667, and cases there treated). Our conclusion is, that the verbal agreement made the Brick Co. the principal obligor on the debt; but it would seem to make little difference whether it became principal or surety, in that the agreement and conduct of respondent concealed the true transaction. The Commission of Appeals (adjunct of the Supreme Court of Texas) spoke as follows in the case of *Wilson* v. *J. W. Crodus Drug Co.*, 222 S. W. 223, 224;

> "It is well established that, where an assumption has been accepted by the payee, the assumptor becomes the principal and the original debtor is surety as to the creditor, unless otherwise specially contracted by the parties." (Citing authorities.)

Where the placing of an apparently unqualified note among the assets of a bank operates to conceal from the examiner the improper indulgence of a customer, we can see no difference between an agreement that the maker is not liable on the note, and one that he will never have to pay it, because the future deposits of such customer will discharge it. The difference would seem to be one of degree only. The vice lies in the deceit of the examiner, and not the particular process by which it was brought about.

There is no doubt that the bank examiner was actually deceived, in that he classified the obligation of the Brick Co. as excessive by reason of only one cash item of $3,000.00 (R. 171); whereas such Company had assumed the debt evidenced by respondent's note, in order for an overdraft not to appear on the bank books. This note was carried as an unqualified asset on the records of the bank through the same examination, which was made January 20th, 1942 (R. 161). Had the note not been so carried, and the overdraft or "cash item," not concealed thereby, there is no doubt but that the bank examiner would have caused the

concealed debt of the Brick Co. to be paid or lifted. In fact, such was exactly what was done with a different $3,000.00 "cash item" that had not been concealed, and which was paid by Thomas during the examination (R. 114, 170, 171, 161). This compels the conclusion that the Bank would not have lost the amount concealed by Respondent's note, had the amount evidenced by the note been properly entered as a cash item or overdraft of the Brick Co.

The Texas Courts ignore the undisputed facts (R. 141-42, 162) to say that the Petitioner received a benefit from the verbal agreement, through application of the proceeds of the note on the Brick Co. overdrafts. Never has the writer seen a "benefit" more cleverly disguised. Taking the conclusion of the courts at face value, the "benefit" received amounted to the bank giving up its valuable right of direct set off against the Brick Co. account, for the doubtful privilege of applying the funds received from the note on the overdrafts, and then relying upon the verbal agreement of the Brick Co. for its future funds to be applied on the note. The "benefit" further was to operate through a verbal agreement, nowhere spread upon the records of the bank, and knowledge of which it must have gained from Thomas alone. As we shall presently demonstrate, the bank had no actual knowledge of the transaction, and should be charged with none through Thomas. But even if it had knowledge, did it not suffer the detriment of being unable to make direct set off of the overdraft against the Brick Co. deposits, for the uncertain one of applying the deposits on a note that no written record showed the Brick Co. to owe? Even should we assume that Thomas failed to make the credits through inadvertence, the loss would not have occurred had the overdraft been continued as cash items. The deposits would have then been automatically

credited to the Brick Co. overdraft, shown by the checks or records.

We cannot believe that one who aids a bank officer to deceive a bank examiner through false entry should have his rights measured by the question of whether a benefit or a detriment resulted to the bank by his actions. The very terms of 12 U. S. C. A., Sec. 592, make punishable anyone who makes any false entry, and we quote: "To deceive any officer * * * or the Comptroller of the Currency * * * or examiner." The existence of a loss or injury to creditors was specifically held to be immaterial to the striking down of an agreement, such as respondent's, in *Deitrick* v. *Greaney*, 309 U. S. 190, 84 L. Ed. 694, 698. Later, in *D'Oench, etc.* v. *Fed. Dep. Ins. Corp.*, 315 U. S. 447, 86 L. Ed. 956, 964, this court further said:

> "And it is no more a defense here than it was in the Deitrick case that no damage was shown to have resulted from the fraudulent or unlawful act. The federal policy expressed in the Act, like its counterpart in state law, is not dependent on proof of loss or damage caused by the fraudulent practice.
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> Though petitioner was not a participant in this particular transaction and, so far as appears, was ignorant of it, nevertheless it was responsible for the creation of the false status of the note in the hands of the bank. It therefore cannot be heard to assert that the federal policy to protect respondent against such fraudulent practice should not bar its defense to the note. Criminal penalties are no more the sole sanctions of the federal policy expressed in this Act than were the criminal penalties imposed on the agreement in the Deitrick case. If the secret agreement were allowed as a defense in this case the maker of the note would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible. The federal policy

> under this Act of protecting respondent in its various functions against such arrangements is no less clear or emphatic than the federal policy of outlawing purchases by a bank of its own stock involved in the Deitrick case. Cf. Rinaldi v. Young 67 App. D. C. 305 92 F. (2d) 229, supra; Federal Deposit Ins. Corp. v. Woods (D. C.) 34 F. Supp. 296."

We can see no distinction between the giving of the note in the *Deitrick* case to conceal the bank's illegal purchase of its own stock, or the giving of the note in the *D'Oench* case to conceal the showing of past due bonds on the bank records, and the giving of respondent's note herein to conceal the existence or creation of an improper indulgence of the Brick Co.

The striking similarity between the pleading and proof in this case, and the defendant's allegations in the case of *First National Bank* v. *Boxley*, 129 Okla., 159, 264 Pacific 184, 64 A. L. R. 588, prompts us to quote the latter as follows:

> "* * * that the said bank through its agents represented to this defendant and to the other persons who signed said notes that, if he would sign a note to the plaintiff bank, being the note herein sued upon, they would carry the same as an asset of said bank, and that the excess loan made by the said bank to the said John W. Gilliland and the Gilliland Oil Company would not appear on the books of the said bank as an excess loan and the said note to be carried by the said bank as an asset, but that the said bank would not look to this defendant for the payment of said note, but would collect the same from the said Gilliland Oil Company; that in furtherance of this situation it was agreed between the said bank and this defendant that this defendant would not be bound by said note, but was simply making the same for the accommodation of the First National Bank of Tulsa, and that the said note would not be the obligation of this defendant; * * *"

In disallowing the defense indicated by this pleading, the Oklahoma Court said:

> "To sanction any arrangement whereby the real assets and securities of the bank are to be regarded as less than or different from the apparent assets and securities would tend to defeat the entire purpose of the regulatory statutes. Parties may not participate in a transaction the object of which is to give to the assets of a bank a favorable appearance for the purposes of examination, but less favorable for the purposes of liability or enforcement. The defendant having signed said note, and it being a part of the bank's assets, an understanding or agreement of nonliability would be neither proper nor tenable. It would amount to a fraud upon the depositors, stockholders, and the public to permit an agreement that the obligation which the defendant assumed was in fact not an obligation."

We appreciate that it is held in some jurisdictions that the receiver of a bank may recover on a note such as Respondent's, but the bank itself may not do so. We think the answer to this suggestion found in the case of *Rogers* v. *First State Bank*, 79 Colo. 84, 243 Pac. 637, 64 A. L. R. 595, to be beyond challenge, as follows:

> "If logically followed out, defendant's argument by reductio ad absurdum, means that it is proper to lock the stable after the horse has been stolen, but not before. This naturally follows, for if the looting must be permitted to continue until a receivership or liquidation, by that time there may be nothing left for the receiver to take over, except, possibly, the secondhand bank fixtures, if that much, the other assets of the bank having been previously dissipated, leaving nothing but an empty shell for the creditors."

The facts in *Livestock State Bank* v. *First National Bank*, 300 Fed. 945, 950 et seq. are similar to those here presented. There the Rocking "H" Company, whose financial agent

was the cashier of the Fairfield Bank, desired to make a loan which was greater than such bank could legitimately allow it. The Livestock Bank contended that the Fairfield Bank had actually made the loan, but had taken from the Rocking "H" Company a note made payable to the Livestock Bank. That the Rocking "H" note was forwarded to the Livestock Bank upon agreement that at maturity it would be charged against such bank's account with the Fairfield Bank. Of this conduct, the court said:

> "The wholesome limitation established by the federal statutes must be circumvented, and hence the sinuous, under cover course of procedure. Business institutions of large affairs and numerous transactions do not withhold the details thereof from their books, and commit to secret oral understandings the evidence of important rights and obligations, unless there is cogent reason for concealment." * * *
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> "To circumvent the wholesome limitation of the law, the plaintiff entered into a secret agreement with Horal, by which, for his benefit, indirectly, but in effect, his bank loaned eight times its maximum capacity, and assumed an obligation greatly exceeding its entire capital; a secret agreement, the purpose of which was to withhold from the Comptroller of the Currency knowledge of a most vicious excess loan, and the natural result of which was to conceal the true nature of the transaction and the true condition of the Fairfield bank from its stockholders and depositors and officers other than Horal." * * *
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> "Without further discussion, it is held that the alleged agreement, if made, was immoral, contrary to public policy, and fraudulent as against the Comptroller of the Currency, as well as the stockholders and depositors of the bank."

In conclusion, we respectfully suggest that the situation presented in this case lies beyond the reach of the decision

in the Texas case of *Goldstein* v. *Union National Bank, et al.*, 109 Tex. 555, 213 S. W. 584. However, should we be mistaken, much has occurred to the institution of banking since that decision, not the least of which has been the reforms beginning with the Banking Act of 1933. There has been a wholesome tendency to divorce the calling of banking from that of speculating. For example, in the *Goldstein* case one of the co-makers of the note in question was Vice President of the National Bank that made the loan; and nothing out of the way was seen in this by the majority opinion therein. It should not be suggested that such a transaction, whereby a bank officer may act both as lender for the bank and borrower for himself would be upheld by the federal decisions today (see *Fed. Dep. Ins. Co.* v. *Vest*, 122 Fed. (2d) 765). We respectfully insist that if there be anything in the *Goldstein* case contrary to the federal cases which we believe we have shown support our conclusions, that that case should be overruled. Certainly, the Texas Supreme Court should not be allowed to follow it in defiance of the contrary pronouncements of this Court on the same subject.

Point Two (Restated)

THE SUPREME COURT OF TEXAS ERRED IN HOLDING AS A MATTER OF LAW THAT THOMAS ACTED AS THE AGENT OF THE PETITIONER IN MAKING THE VERBAL AGREEMENT OF DECEMBER 31, 1941, DESPITE THE UNDISPUTED EVIDENCE, THE VERDICT OF THE JURY, AND THE IMPLIED FINDINGS OF THE TRIAL COURT, ALL TO THE CONTRARY.

Argument and Authorities under Point Two

Thomas testified that he did not act for the bank in making any agreement that it would hold money out of the Brick Co. funds, and apply the same on respondent's note (R. 150-51). Respondent testified positively that Thomas did not say that the Bank would apply Brick Co. funds on the note (R.

128), and that there was nothing in the conversation between him and Thomas to indicate the Bank was going to do anything with the Brick Co. funds (R. 127, also see 136-37).

The jury found that respondent both borrowed the money, and executed the note of December 31, 1941, for the sole purpose of procuring the same and loaning it to W. M. Thomas personally (Issues 14 and 15 R. 41-42). In obedience to these findings, the trial court entered judgment for petitioner (R. 45).

First, it appears that the evidence was undisputed that Thomas acted either for himself or the Brick Co. in entering into the verbal agreement as to the payment of the note. However, if it could be said that there is room for minds of reasonable men to differ on the subject; yet the implied finding of the trial court must be in accordance with the judgment entered on the verdict. A necessary part of the defense urged by respondent, in the nature of the verbal agreement, was that Thomas acted as the agent of the bank in the transaction. Texas Rule of Civil Procedure 279, (see Appendix A), plainly states that where one of the component issues necessary to a defense is submitted, but others are omitted without objection, and we quote: "* * * such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment". The present eminent Chief Justice of the Texas Supreme Court has precisely upheld our contentions under this rule, as will be seen from consulting Appendix B.

It cannot be successfully contended, that the submission of the issue as to whether the agreement was made by Thomas presented the complete defense pleaded by reason of the agreement. Unless Thomas acted as the agent of the Bank in making the same, naturally the bank was not bound thereby. Thus, it was necessary for the respondent to pro-

cure a finding, if the evidence raised the issue, that Thomas did so act as the agent of the Bank. In failing to do this, respondent is bound by the contrary implied finding of the trial court in support of judgment.

Another reason for the inescapable conclusion that the trial court found Thomas not to be the agent of the bank, arises from the manner of submission of Issues 14 and 15. We frankly think that these Issues standing alone constitute a finding that Thomas acted personally. But if they do not, most certainly they constitute the submission of one of the Issues necessary to establish that Thomas acted in his own behalf in the transaction, and not for the bank. With one of such issues submitted, and no objection having been made at the failure to submit others, any omitted issue as to the capacity in which Thomas acted was impliedly found by the trial judge for petitioner, and in support of Judgment.

The Texas Supreme Court granted the Writ of Error on the point in petitioner's Application raising the above contentions. It will be observed that it did not discuss this point at all in the opinion, and simply glossed over the subject by saying that the conduct of Thomas "was clearly within the scope of Thomas' general agency." The obvious reply to this statement is, that likewise the conduct of Thomas was wholly consistent with the conclusion that it was beyond the authority vested in him by the Bank, or even his general agency. Certainly, the mere fact that an agent *may* have acted within his general agency will not be allowed to destroy a finding on contradictory evidence that he *did not* so act. Yet, this is exactly what the Supreme Court of Texas attempted to do by its decision in this case.

Point Three (Restated)

THE TEXAS SUPREME COURT ERRED IN HOLDING PETITIONER WAS CHARGED WITH KNOWLEDGE OF THE VERBAL AGREEMENT OF DECEMBER 31, 1941, UNDER THE "SOLE ACTOR" DOCTRINE; NOTWITHSTANDING THE JURY VERDICT AND IMPLIED FINDINGS OF THE TRIAL COURT TO THE EFFECT THAT THOMAS ACTED IN A PURELY PERSONAL CAPACITY IN MAKING THE AGREEMENT, IN FRAUD OF PETITIONER, AND THAT IT WAS TO HIS DEEP FINANCIAL INTEREST NOT TO DIVULGE THE EXISTENCE OR NATURE OF THE AGREEMENT TO PETITIONER.

Argument and Authorities under Point Three

Before December 31, 1941 Respondent had been told by Thomas that the latter owned a lot of stock in the Waterman Brick & Tile Co. and was operating it, or aiding in its operation (R. 127, 157). Thomas testified that he put between $25,000.00 and $30,000.00 more into the Brick Co. than he realized therefrom (R. 151). In referring to the account of the Brick Co. with the bank on January 20, 1942, the bank examiner reported: "The Company owes Vice President Thomas $12,000.00, which has been verbally subrogated to the bank's debt" (R. 171).

We have earlier pointed out (Point Two) that if the evidence raised a fact issue as to the capacity in which Thomas acted, the same was resolved by the Trial Court in favor of the petitioner. Regardless of any finding on the facts, we contend that they establish as a matter of law that Thomas' knowledge of the agreement was not imputed to petitioner. His interest in the matter was so antagonistic to that of petitioner, as that he must conclusively be deemed to have dealt with petitioner at arm's length.

The only basis for the conclusion of the lower appellate courts that petitioner had knowledge of the agreement, rests in the application of the "sole actor" doctrine. These courts seem to proceed on the theory that notwithstanding the fact that Thomas had adverse interests to his principal;

since he acted alone for it in the transaction, it is charged with his knowledge thereof. We do not believe there is a single federal decision which holds the principal charged with the knowledge of an agent that acts for his own benefit and at the expense of his principal, as well as that of the other party. Mr. Justice Harlan refused to do so for this court in the case of *American Surety Co.* v. *Pauly*, 170 U. S., 133, 156, 158, 159, 42 L. Ed. 977. In the course of the opinion, Pomeroy on equity was favorably quoted as follows:

> "It is now settled by a series of decisions possessing the highest authority that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fradulently concealed."

We digress from the treatment of the authorities long enough to point out that respondent procured a finding of the jury to the effect that at the time Thomas made the agreement of December 31, 1941, he did not intend to perform the same (Issue 4 R. 39). Bearing in mind that the agreement contemplated the taking of the Brick Co. funds and applying them on respondent's note, how can it be said that Thomas' agency with petitioner was not destroyed by his intention to defraud "his own principal * * * as well as perhaps the other party"? The lower courts have held that the failure to carry out the agreement on the part of petitioner has relieved respondent of liability on the note. What chance did petitioner have of learning of the agreement through Thomas, when the latter did not intend to

perform the same when he entered into it? Should the wildest presumption suggest that Thomas would have notified other agents or officers of petitioner of the existence of the agreement so that they could perform it, when Thomas did not intend to see it performed? We do not ask these questions in an accusatory manner, but to us they are burning ones that should have been answered by the lower courts, and which were apparently overlooked by them.

That the fraud of Thomas against his principal redounded to his credit leaves little room for doubt. Aside from the heavy financial investments that he had in the Brick Co., the examination of the bank on January 20, 1942 shows that such Company owed him personally $12,000.00; and that such amount was subrogated to the amount the Company owed his principal. It must be said that it was to the interest and benefit of Thomas to see the note given by respondent paid otherwise than from the Brick Co. funds. It was not to the interest or benefit of Thomas for the Brick Co. funds to be used in repaying its obligation to the bank (by discharging respondent's note), when Thomas had a $12,000.00 note of the Brick Co. that was subrogated to its loan from the bank.

In *American National Bank* v. *Miller*, 299 U. S. 517, 57 L. Ed. 1310 the dominating officer of a Macon bank, one Plant, became insolvent while a large overdraft was held against him by the bank. He gave the Macon bank a $3,000.00 check on an account he had in a Nashville bank, which upon transmittal was credited to the account of the Macon bank in Nashville. Upon suit by the Macon bank, the Nashville bank contended that Plant's knowledge of his own insolvency, as president of the Macon bank, was notice to the bank thereof. In holding that the Macon bank was not charged with notice, this court said:

> "On May 13th Plant was indebted to the Macon Bank on this account between $75,000.00 and $100,000.00.

A national bank examiner was in the city, and it was expected that he would examine the books of the Macon bank within a few days, when this *illegal overdraft* by the president would appear. Rev. Stat. 5200, U. S. Comp. Stat. 1901, p. 3494; Evans vs. United States, 153 U. S. 584, 38 L. Ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668. Plant thereupon gave *the bank checks* and commercial paper *to pay the balance*. It was to his personal interest to conceal any fact which would prevent the Macon bank from receiving paper in satisfaction of a debt which had been unlawfully contracted by reason of his official position. An element of that interest was that he should conceal not only the fact of his insolvency, but the fact of his indebtedness to the Nashville bank, lest Macon bank should thereby refuse, to take the $3,000.00 check at its face value. Without, therefore, inquiring as to what would have been the duty of the Macon bank had it known of Plant's insolvency and indebtedness on the $50,000.00 drafts, we hold that as it had no such knowledge in fact, it was not charged with such knowledge in law." (Emphasis ours).

The rule announced in the *Miller* case was distinguished from that applied in *Curtis C. & H. Co.* v. *U. S.*, 262 U. S. 315, 67 L. Ed. 956. There the Vice President of the corporation, entrusted without restrictions to procure title to lands patented by the government, exercised fraud in such procurance Other stockholders in the corporation were named Collins and Curtis. Mr. Justice Taft first stated that Plant, in the *Miller* case, was engaged in something in which his interest was plainly independent of any agency of his on behalf of the bank, and continued to say:

"The interest of Collins, Curtis, and Holbrook in the acquisition of the title was common. Curtis and Collins knew exactly how far Holbrook's interest was adverse to theirs, but trusted him in the joint enterprise notwithstanding. The adverse interests, as be-

> tween them, in sharing the fruits of the common business, cannot enable the company to retain its share and repudiate the agent with all he knew."

It should be remembered that in that case no safeguard was imposed upon Holbrook's activities, other than that the paper titles procured should be examined by a reputable attorney. In the present case, the bank not only had a Board of Directors which met monthly (R. 168) to conduct the affairs of the bank, but likewise had a special Discount Committee which made written reports of all notes discounted, etc. (R. 169). These facts alone, coupled with the fact that Thomas had no general authority to loan over a thousand dollars ($1,000.00) (R. 165) should remove this case from the reach of the "sole actor" doctrine. At least, we think the better authorities so hold (See *State Savings Bank* v. *Montgomery*, 126 Mich. 327, 85 N. W. 879, 882).

We believe Thomas must be considered to have acted independently of his agency with the bank in the transaction involved. Respondent pleaded Thomas acted for both the bank and the Brick Co. (R. 7). Petitioner pleaded in effect that Thomas acted for himself alone, in that the transaction constituted a personal loan to him by respondent (R. 22). Thomas positively testified in support of these allegations (R. 149). The jury, under our contentions, definitely determined that Thomas acted independently of his agency with petitioner (Issues 14 through 17, R. 41-42). In any event the implied findings of the court so established.

Could Thomas act in a representative capacity with petitioner, in negotiating a loan to himself personally? We think this question unalterably answered by the opinion in the case of *Fed. Dep. Ins. Corp.* v. *Vest*, 122 Fed. (2d) 765 where the defendant gave his note to the bank, and

then gave the proceeds to its president, Morton. The court thus spoke of Morton's part in the transaction:

> "His role was that of borrower and not as representative of the lending bank. He was the only bank official active in the transaction and he obviously did not, nor could, represent the bank, since he was dealing with himself."

We earnestly believe that Thomas could no more represent petitioner in the present instance, in procuring a personal loan through Tittle, than Morton could have represented his bank procuring a personal loan through Vest.

It is interesting to note that the Texas Supreme Court considered itself bound by a Texas decision which is directly in conflict with the *Vest* case.[7] In the *Goldstein* case the bank was charged with the knowledge of its Vice President Walker on the "sole actor" doctrine. Yet, Walker was co-maker of the note on which Goldstein was sued, and actually did borrow the funds personally. Apparently, the Texas court saw no harm in permitting Walker to act both as lender and and as borrower. The Federal courts have always held to the contrary.

We do not burden the court with further discussion of authorities, but do refer to the cases of *Kean* v. *National City Bank*, 294 Fed. 214 and *Anderson* v. *General Am. Life Ins. Co.*, 141 Fed. (2d) 898, in each of which cases the authorities are exhaustively discussed. We believe, as stated in the later of such decisions, that in no case "closely akin to the instant controversy has the sole actor doctrine been so applied as to impute to a principal knowledge of the fraudulent conduct of an agent." If the Texas *Goldstein* case does so, the time for removing its stigma on decisions under the National Banking Act is overripe.

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[7] *Goldstein* v. *Union National Bank*, 109 Tex. 555, 213 S. W. 584.

Point Four (Restated)

THE TEXAS SUPREME COURT ERRED IN HOLDING THAT THE VERBAL AGREEMENT OF DECEMBER 31, 1941, MADE CONTEMPORANEOUSLY WITH THE EXECUTION OF RESPONDENT'S NOTE, DID NOT CHANGE THE MANNER AND TIME OF PAYMENT OF THE ORIGINAL NOTE, IN VIOLATION OF THE PAROL EVIDENCE RULE.

Argument and Authorities under Point Four

The gist of the agreement of December 31, 1941 was to change the time and manner of payment of Respondent's note. Relying upon the ubiquitous *Goldstein* case, and also that of *Commercial State Bank* v. *Ellington*, 24 S. W. (2d) 359, the Texas Supreme Court held that the agreement was admissible to show payment of the note, as distinguished from one which would change the time and manner of payment of the same. As we pointed out in that court, we frankly cannot see any distinction between the basic facts in the *Ellington* case, (24 S. W. (2d) 359), and the extremely similar facts in the case of *Robertson* v. *City National Bank*, 36 S. W. (2d) 481. Most certainly, we feel the facts in the present case bring it squarely within the reach of the *Robertson* decision, wherein it was said:

> "The note being executed for a valuable consideration parol evidence was not admissible to show an agreement on the part of the makers with appellees' cashier that they would *not be required to pay such note but that the same would be paid out of the assets of the Guaranty State Bank.* Such evidence tends to vary the unconditional promise of the makers to *pay* such instrument according to its tenor and effect, which is not permissible in the absence of a plea of fraud, accident, or mistake." (Citing authorities.) (Emphasis ours.)

The decisions of this court uniformly support our contention as we see it. Thus it was said in *Brown* v. *Spofford*, 95 U. S. 474, 482, that:

> "Parol evidence of an agreement, made contemporaneously with a promissory note which contains an absolute promise to pay at a specified time, is not admissible in order to extend the time for payment, or *to provide for the payment out of any particular fund*, or in any other way than that specified in the instrument, or to make the payment depend upon condition. Chitty, Contr. (10th Ed.), 99; Abrey v. Crux, Law. Rep. 5 C. P. 41; Allan v. Furbish, 4 Gray, 514; 2 Pars. Bills and Notes, 501." (Emphasis ours.)

It must be borne in mind that the agreement relied on to show payment failed to fix any time whatever for payment of the note, but vaguely referred to funds the Brick Co. hoped to collect in the future.

A full discussion of the cases on the point raised may be found in 71 A. L. R., page 556, notes 25 and 26 thereof indicating to the writer that the Texas cases seem to fall on both sides of the fence.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of supervisory powers, in order that the National Bank Act may be uniformly administered throughout the several states, and that the policy of bank examinations serving a useful purpose may remain effective in Texas, and that to such an end the Writ of Certiorari should be granted and this court should review the decision of the Supreme Court of Texas and finally reverse it.

S. P. Jones,
Franklin Jones,
C. A. Brian,
Ernest F. Smith,
Counsel for Petitioner.
By S. P. Jones.

APPENDIX A

"Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered make and file written findings on such omitted issue or issues in support of the judgment, but if no written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. * * *" (Amended by Order Mar. 31, 1941) (Paragraph 2, Rule 279, Vernon's Texas Rules of Civil Procedure, Franki, page 290.)

APPENDIX B

"Under this rule (279), if a ground of recovery or of defense is wholly ignored or neglected, and no issue is submitted or requested thereon, it will be held to have been waived and no recovery or defense can be based thereon. If, however, the grounds of recovery or of defense consist of more than one element—that is, require more than one issue to submit them—and the court submits some of the elements but omits others, and there is no objection to the failure to submit same, the parties will be placed in the position of having agreed to waive a jury trial on the unsubmitted elements and to have submitted them to the court for his determination." (Lecture before Judicial Section State Bar of Texas, July 3, 1941, by Hon. James P. Alexander, Vernon's Texas Rules of Civil Procedure, Franki, page 296.)

See also *Blaffer* v. *Powers*, 169 S. W. (2d) 536 at 554 (W. E. Ref).

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 1054

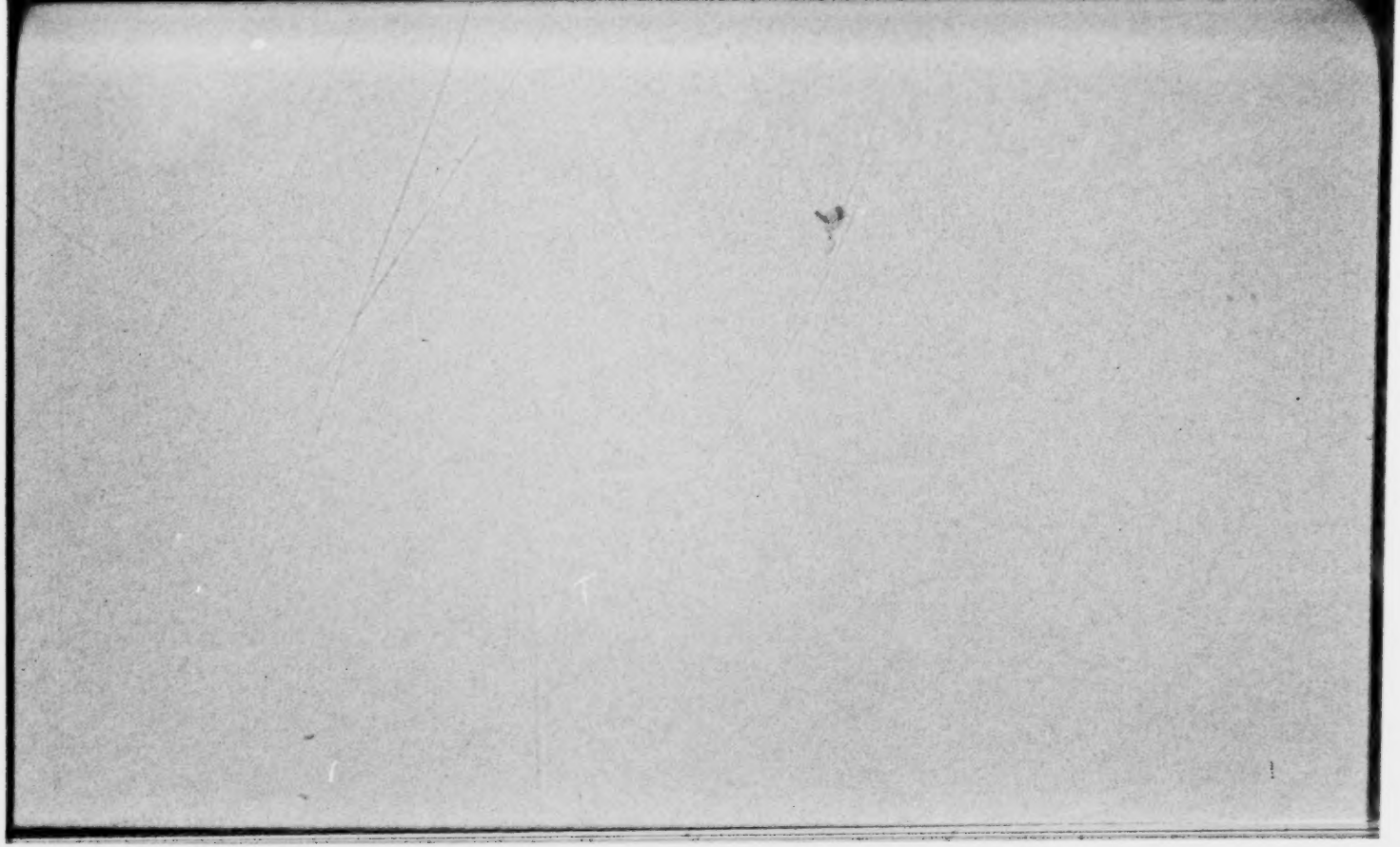
THE STATE NATIONAL BANK OF MARSHALL,
IN LIQUIDATION,
Petitioner,

vs.

W. D. TITTLE,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

SAM B. HALL,
CARY M. ABNEY,
P. O. Address:
Marshall, Texas,
SIDNEY L. HEROLD,
P. O. Address:
Shreveport, La.,
Counsel for Respondent



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—1—

The opinion of the Supreme Court of Texas is reported in 183 S. W. (2nd) 720, and that of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas in 179 S. W. (2nd) 1010.

—2—

Statement of the Case

The facts and pertinent parts of the record are correctly stated in the opinion of the Court of Civil Ap-

peals (R52), the Texas court of last resort on fact issues.* The petition does not contain a correct statement of either. We respectfully submit the following statement in lieu of that contained in the petition and supporting brief:

Petitioner, a solvent National Bank in voluntary liquidation with all of its debts paid (R. 116 and 149), sued respondent, called Tittle, to recover on a note for $2,000.00 executed by him to the Bank, dated July 17, 1942, payable ninety days after date (R. 3-5). The note was the second renewal of a $3,000.00 note Tittle executed to the Bank on December 31, 1941. Tittle pleaded several defenses to the note, among which was that the original note was executed under an agreement that its proceeds would be applied to the payment of an overdraft of the Waterman Brick & Tile Company, called Brick Company, which when added to its note indebtedness to the Bank, exceeded the amount the Bank could lend to a single customer, and that W. M. Thomas, Vice-President, Cashier, and Chief Executive Officer of the Bank, and its sole representative in the transaction, acting for the Bank and the Brick Company, agreed that a large sum of money then due the Brick Company under a contract for its products used in the construction of the Lone Star Ordnance Plant, and later received by the Bank, would be applied to the payment of the note; that such agreement created a trust in the fund in Tittle's favor, and operated as an assignment of a sufficient amount thereof to liquidate the note; that the receipt

*1, Texas Constitution, Article 5, Section 6: "Provided that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error."

R. S. Article 1820: "The judgments of Courts of Civil Appeals shall be conclusive in all cases on the facts of the case."

of the fund by the Bank operated as a full payment of the original note, and the two renewal notes were procured by fraudulent representations, the first, that nothing had been received on the contract, and the second, that only the $1,000.00 applied to the note, had been received (R. 5-15). The Court of Civil Appeals and the Supreme Court of Texas both held that the facts pleaded constituted a good defense to the note, and that every fact essential thereto was found by the jury, or established by stipulation of the parties or undisputed evidence.

In answer to special issues the Jury found the following facts supporting the defense: At the time the note was executed Thomas agreed with Tittle that the note would be paid out of the funds under the Lone Star contract; at the time the note was executed Thomas represented to Tittle, and Tittle believed, the proceeds thereof would be applied to the payment of the Brick Company's overdraft; that Tittle was induced to execute the first renewal by the fraudulent representation by Thomas that nothing had been received under the contract, and the second note, upon the fraudulent representation that only the $1,000.00, which had been applied to the note, had been received (R. 37-42). None of these findings was attacked by the Bank in the trial court, nor in either of the appellate Courts. All were established by substantial evidence (R. 123-125). Indeed the plaintiff's witness Thomas admitted the false representations were made (R. 150-2). He denied out right that he had made the agreement that the contract fund would be applied to the note, which is probably the basis for the Bank's claim that his testimony was that he did not

make the agreement for the Bank. He did admit that he told Tittle that the Bank had let the Brick Company have all that it could, and the Bank wanted Thomas to let the Brick Company have more money, and he wished to borrow for that purpose (R. 149-50). He further admitted that he told Tittle he wanted the money to use in taking care of obligations until the money came in, and was borrowing the money against the Brick Company's receipts (R. 152, 153). The Bank plead that Thomas represented the Brick Company in the transaction (R. 23). The undisputed evidence of Thomas (R. 143), and Holland (R. 151) established the authority of Thomas to make the agreement for the Brick Company. The officials of the Bank testified that it was Thomas' duty to collect the overdraft, and the directors expected him to do so (R. 167, 105-6). Both Thomas and Tittle testified that Thomas was the only officer or employee of the Bank who had anything to do with taking the original note and the renewals thereof, and that he alone acted for the Bank in all of the transactions (R. 153-138). This testimony was not disputed. The parties stipulated that beginning on January 13, 1942, and ending on April 29th, 1942, payments totalling over $30,000.00 were received under the Lone Star contract, and deposited by the Bank to the credit of the Brick Co. (R. 120-2). It is true as stated in the brief that Holland, Assistant Cashier of the Bank and its Liquidating Agent, testified that the proceeds of the $3,000.00 note did not go to the credit of the Brick Company, if this is material to the issue here involved. However, on cross examination he admitted "I haven't been able to show where it," meaning proceeds of the

note, "went; but know it didn't go to the Waterman Brick & Tile Company that day or Mr. Thomas; I don't know where it went. I have an idea, but I don't know." (R. 168). Thomas testified the proceeds of the note went into the Brick Co.'s account. (R. 150).

In its efforts to raise a Federal question, the Bank has repeatedly stated in its petition and brief that the agreement to apply the funds from the contract to the payment of the note was a secret agreement, the note was a sham note, never to be paid, and intended only to deceive the banking authorities, and both were parts of a scheme to violate the national banking laws by making the books of the bank reflect a false condition of its affairs, but utterly ignores the undisputed evidence and findings of the jury to the contrary. We quote the testimony of Tittle given in answer to persistent questioning from the Bank's counsel:

"Q. You knew this note you gave December 31, 1941 didn't represent $3,000.00 that the Bank could Collect?

"The Witness: I knew they could collect.

"Q. Not from you?

"A. They could collect it from me.

"Q. You recognized you were responsible for the note?

"A. He told me I wouldn't have to pay it.

"Q. And you were not responsible for it?

"A. I knew I was responsible for it— He told me I didn't have to pay it.

"Q. You knew the Bank could collect it, when you made it?

"A. Yes, sir.

"Q. You gave it to them and knew they could collect it?

"Q. That is true?

"A. Yes, sir." (R. 135.)

* * * *

"As to why I didn't write on that note never to be paid, I expected the note to be paid from the proceeds from the Ordnance Plant. I did not think it was a sham note, but thought that it would be paid from the contract. (R. 138).

* * * *

"When this note was executed and Mr. Thomas made the statement to me, I did not know Mr. Thomas wouldn't make the records of the Bank reflect the true state of affairs and facts about it. I did not know that Thomas intended to use the note for an unlawful purpose, nor was there anything to cause me to suspect Mr. Thomas intended to violate the law." (R. 125)

* * * *

"Q. You told us several things that was said and I gave you a little time to think about it, and you didn't tell us anything about Willis making a record in the Bank to show you were free; Willis didn't say anything about doing that?

"A. No, sir, he didn't.

"Q. You knew no record would not be made about it?

"A. I did not know about it; I figured it would be handled in the usual way." (R. 130)

* * * *

"I did not think the note would appear as a false asset in the bank statement. I had no reason to suspect the books of the Bank wouldn't reflect the agreement under which the note was executed. I did not have access to the books of the Bank, and would not have executed the note if I had known that Mr. Thomas failed to make the proper record of it in the Bank. I did not know that the Bank examiner did not know all of the facts in connection with the note. I did not know if Mr. Thomas intended to deceive the Bank examiner about it." (R. 139).

The agreement was made at the desk of Mr. Thomas in the Bank near the desk of another officer (R. 122),

and though the Bank has repeatedly made the statement that the agreement was a secret one, it cites no part of the record to sustain the statement, and it cannot do so. The Bank did not request the submission of an issue on the agreement being a secret one. The Jury found in answer to an issue requested by the Bank that the original note was given to borrow $3,000.00 for the purpose of lending it to Thomas and for the accommodation of Thomas (R. 48-9). Out of an abundance of caution Tittle in the Court of Civil Appeals, assigned error attacking these findings as being inconsistent with the findings that the note was given for the purpose of raising funds with which to discharge the overdraft, and if the findings had in fact been in conflict, Texas procedure would have required that the case be reversed and remanded for a new trial, but the Court properly held that the findings were reconcilable.

When the original note was executed the Bank could lawfully lend only $15,000.00 to a single customer, and the Brick Company's note indebtedness at that time was $14,406.46 (R. 105). The record does not show the amount of the Brick Company's overdraft at that time as the teller sheets were destroyed after the Bank went into liquidation. It was shown however, that at that time the Bank was carrying as cash items the following checks drawn by the Brick Company and paid by the Bank without having funds on hand sufficient to cover:

(1) For $3,000.00 payable to Continental American Bank and Trust Company, dated October 15, 1941.

(2) For $1,242.76 payable to the Bank, dated November 10, 1941.

(3) For $2,034.53, payable to the Bank, dated December 22, 1941.

(4) For $354.40, payable to Standard Tool & Machine Co. dated December 22, 1941.

(5) For $480.20 payable to L. & A. Railway, dated December 19, 1941. (R 115-116)

The average daily overdraft of the Brick Company during the month of December 1941 was $11,217.00, and for January 1942 $7,493.00 (R. 106-7). For a long period of time continuing to the liquidation of the Bank in July 1942, the Brick Company was permitted to overdraw its account under an arrangement by which it was charged twenty-five cents for each check that overdrew the account, and 10% interest on the average daily overdraft balance (R. 106, 155). "I think this overdraft for Waterman Brick & Tile Company was a very profitable thing for the Bank." (Thomas' testimony, R. 156.) Each month an analysis slip was prepared showing the average daily overdraft, the amount charged therefor, and other details, and these slips were cleared through the Brick Company's account as checks and posted on the books of the Bank (R. 111). Many of these slips were introduced and showed the Brick Company's account to have been overdrawn for practically every month from November 1940 until the Bank went into liquidation. Thomas was financially interested in the Brick Company, and Holland, an executive officer of the Bank, had known this since 1941, and that he became its general financier about that time (R. 105, 114). Ob-

viously the directors had the same information because many of them executed notes to the Bank and let Thomas have the money for the Brick Company.

Thomas testified that he did not know how long he had followed the practice of having the directors and stockholders of the Bank execute notes to the Bank and lend him the money for the Brick Company and his other financial ventures; he said about eight or ten years with the directors, and about two or three years with the stockholders, outsiders, and customers of the Bank (R. 155); the President and Directors had access to the records of the Bank, and these transactions could easily have been checked (R. 157); he did not borrow from every stockholder available, but he estimated that transactions of this kind occurred with about fifty of them (R. 154); and Holland knew of practically every transaction (R. 154). Holland could recall only about half a dozen stockholders who executed notes of this kind, but according to his testimony several of such notes were executed by stockholders, directors, and the Bank's attorneys, and were on hand when the Bank went into liquidation (R. 144, 146).

It is true as stated in the Bank's petition and brief, Tittle alleged that the Brick Company's line of credit had been criticized by the Bank Examiner before the original note was executed. Tittle did not have access to the records of the Bank, and this allegation was erroneous according to the testimony of Holland to the effect that the Bank Examiner did not question the Brick Company's line of credit at the September 1941 examination, but did so at the examination on January 20, 1942. (R. 114-115, 170).

ARGUMENT

The petition fails to show that the Bank has been denied any right guaranteed to it by Federal Statutes, unless it can be said that the Bank's long continued violations of the National Banking laws clothed it with immunity from well settled rules of Civil Law. Tittle participated in none of the many violations of law which the record shows to have been committed by the Bank, its officers, directors and stockholders. As aptly stated by the Court of Civil Appeals, the case does not fall within the rules announced in *Deitrick* vs. *Greeney* 309 U. S. 190; 84 L. Ed. 694, and *D'Oench Company* vs. *F. D. I. Corporation* 315 U. S. 447; 86 L. Ed. 956. These cases go on further than to hold that one who enters into an agreement in violation of the National Banking laws is estopped to set up the agreement to avoid his liability under the illegal transaction. The Bank here is a solvent National Bank with all of its debts paid, and in voluntary liquidation. It is not within the creditor class that can invoke the rule in the decisions referred to, because it has no creditors nor depositors to protect, and can have none in the future. Even though it were in such class the rule referred to does not permit a National Bank, by its own illegal acts, to destroy legal rights of innocent victims who deal with it. We join with the Bank in its solicitude for the protection of the integrity of the National Bank system, but we believe that this commendable object is more likely to be accomplished by visiting upon the guilty stockholders and officers, the consequences of their own illegal acts, rather than permitting them to profit thereby at the expense of innocent victims.

The agreement which Tittle invoked was not an unlawful agreement. The Court of Civil Appeals held in accordance with the settled jurisprudence of Texas, that the agreement operated as an assignment of the contract fund, and created a trust therein. This holding was obviously so sound that the Bank has never questioned it. It did not assign the holding as error in the Supreme Court, and that Court had no jurisdiction to review it.*

The Bank attempted to escape the effect of this holding by urging the absurd doctrine that one who converts trust funds cannot be held liable unless he agreed that he would not do so. It would have had difficulty in taking a position that has been more universally condemned by both Federal and State decisions. The obvious unsoundness of the proposition was no doubt the reason the Supreme Court of Texas did not notice it, of which the Bank complains on page 29 of its brief. The Court was evidently misled as to the state of the record in granting the application, by the same bold and unfounded statements there made by the Bank, as in its petition for certiorari. The Supreme Court of Texas could hardly have considered as doubtful, or calling for further discussion, a principle it had announced in so many of its decisions, and only a short time before in the case of *Wichita Royalty Company* vs. *National Bank of Wichita Falls* 89 S. W. (2nd) 394, 399, from which we quote:

> "The rule that the acceptance of payments from trust funds by a creditor to be applied on its debt

*1. Texas rule of Civil Procedure 476: "Trials in the Supreme Court shall be only upon the questions of law raised by the assignments of error in the application for writ of error, or upon the questions of law which were certified to the Supreme Court from a Court of Civil Appeals."

establishes actionable participation by the creditor in the wrongdoing of the debtor is definitely established and recognized in this State, as well as in other jurisdictions, and by leading textwriters. *United States Fidelity & G. Co.* vs. *Adoue & Lobit*, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, 384, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914B, 667; *Interstate National Bank* v. *Claxton*, 97 Tex. 569, 80 S. W. 604, 607, 65 L. R. A. 820, 104 Am. St. Rep. 885; *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759, 761, L. R. A. 1916F, 1059; *Allen* v. *Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916, L. R. A. 1915C, 518; *Massachusetts Bonding Co.* v. *Standard Trust, etc., Bank*, 334 Ill. 494, 166 N. E. 123, 126; *Havana Central R. Co.* v. *Central Trust Co.* (C. C. A.) 204 F. 546, L. R. A. 1915B, 715; *State v. American State Bank*, 108 Neb. 129, 187 N. W. 769; *Ward* v. *City Trust Co.*, 192 N. Y. 61, 84 N. E. 585; Bogert, Trusts and Trustees, Vol. 4, 907, 912; Morse on Banks and Banking (6 Ed) vol. 1, 317; Perry on Trusts and Trustees (7 Ed.) Vol. 11, 828."

The Bank seeks to invoke the jurisdiction of this Court because, it claims, the National Banking laws were violated. It urges: (a) The transaction of December 31, 1941 created and concealed a new loan to the Brick Company in excess of the amount the Bank could lawfully lend it; (b) The agreement was a secret one, and (c) The note was a sham note never to be paid, and intended only to deceive the banking authorities. It made the same charges in each of the appellate courts, but did not there, nor does it here, cite any portion of the record that tends to support either charge.

At the time the transaction occurred the Brick Company owed the Bank $14,486.46 on its notes, $7,101.80 on five large checks that it had paid and was carrying

as cash items, and an undisclosed amount on numerous small checks that it was carrying in the same manner. The jury found that at the time the agreement was made Thomas told Tittle and Tittle believed, the proceeds of the note he executed to the Bank would be used to discharge the Brick Company's overdraft. Neither finding has been attacked, and both are supported by ample evidence. Thomas testified that the proceeds of the note went into the Brick Company's account. Holland testified that it did not, but on cross examination admitted that he did not know. It is difficult to see how it can be said that the transaction increased the Brick Company's indebtedness to the Bank. There is no evidence to show that the Brick Company was liable on the note, but if such were the case, still its indebtedness would not have been increased because the debt it owed would have remained the same. Tittle had no connection with the Brick Company, and knew nothing about its affairs. He testified, and it was not contradicted, that he did not have access to the books of the Bank, and did not know or have any reason to suspect that the full details of the transaction would not be shown by the Bank's records. If there is any evidence in the record to the contrary, the Bank has failed to cite it.

In the light of Tittle's testimony, quoted on a previous page hereof from page 135 of the record, it is inconceivable that the Bank's counsel would urge that the note was a sham note, or was never intended to be paid. Tittle testified in response to repeated questioning from the Bank's counsel that he knew the Bank could collect the note from him, and that he was responsible for it, though naturally he expected

Thomas to live up to the agreement and apply the proceeds of the contract to its payment. If the Bank had done this it would have lost nothing. The undisputed evidence shows that the Brick Company's overdraft was entirely liquidated on January 20, 1942, including the checks it had on hand at the time the agreement was made, and those that it thereafter cashed without deposits to cover. At that time only about $12,500.00 had been received under the contract (R. 120). Thereafter the Bank received over $20,000.00 from the same source, but instead of applying these sums to the note indebtedness of the Brick Company until paid, it continued in its unlawful practice of permitting the Brick Company to overdraw its account when the overdrafts would bring its indebtedness above the limit fixed by law, and this continued until the Bank went into voluntary liquidation in July 1942. The record shows that the average daily overdraft balance of the Brick Company to have been $4,392.00 in February 1942, $8,678.00 in March 1942, $6,568.00 in April 1942, $3,967.00 in May 1942, and $6,420.00 in June 1942 (R. 110-111). The conduct of the Bank and its officers in this respect was only a continuation of the policy pursued for years in the operation of the Bank in total disregard of the National Banking Laws. The excessive overdrafts of the Brick Company had existed for many months before the transaction occurred. For about ten years the directors had executed notes to the Bank for the accommodation of Thomas and his different ventures, and during the last two or three years its stockholders and attorneys had joined in the wild carnival of lawlessness.

The Bank would boldly disregard the findings of the jury that the note was executed for the accommodation of Thomas to raise funds with which to liquidate the unlawful overdraft. Notwithstanding these findings and the rule of universal recognition that every holder of an accommodation note, except the accommodated party, can enforce its payment, the Bank continues to argue that the note was a sham note, and never to be paid.

Under the circumstances that existed at the time the agreement was made, there can be no doubt but that the transaction was lawful. The Brick Company's indebtedness to the Bank was far in excess of the limit fixed by law, and this subjected the Bank and its officers to the severe penalties prescribed by the Banking Code. Thomas and the directors were personally liable for the excessive loan. The Bank had to enforce payment of the overdraft, and the Brick Company had no funds with which to pay it. It had a deferred asset in the contract fund. The law had been violated, and it would have been unlawful for the Bank to have continued to carry the overdraft in any form, though it was the duty of the Bank and its officers to salvage whatever they could out of the transaction, and if the Brick Company could not have pledged the fund to an outsider and procured the means with which to pay the overdraft, the law would not have been violated by the Bank taking an assignment of the fund. Allowing the overdraft to be incurred, and not the means taken by the Bank to save itself against loss, would have constituted the violation of law.

It is well settled by the Federal decisions that re-

strictions upon loans do not apply when the purpose is to salvage a bad asset. If necessary to accomplish such purpose, the Bank could have lawfully made additional expenditures. See *Holman* vs. *Cross* 75 Fed. (2nd) 909; *Atherton* vs. *Anderson* 86 Fed. (2nd) 518; 99 Fed. (2nd) 883; *First National Bank of Charlotte* vs. *National Exchange Bank* 92 U. S. 122; 23 L. Ed. 679. Further the Banking Law itself, U. S. C. A., Title 12, Section 375A forbidding loans to executive officers of a bank, contains the following exception:

> "Nothing contained in this section shall prohibit an executive officer of a member bank from endorsing or Guaranteeing for the protection of such Bank, any loan or other asset which shall have been previously acquired by such Bank in good faith, or from incurring an indebtedness to such Bank for the purpose of protecting such Bank against loss or giving financial assistance to it"

The net result of the transaction of December 31, 1941 was to substitute a sound and legal asset for a doubtful and illegal one. There is no law, State or Federal, which closes the doors of a National Bank to a solvent person who seeks to borrow funds for the purpose of enabling an unfaithful servant to make restitution for a wrong he has committed.

Tittle was solvent, and had an established line of credit with the Bank. His note was good for far in excess of its amount. It seems preposterous that the Bank would urge that he must be deprived of his security by the unlawful acts of the Bank, and for no better reason than his act in lending his credit to enable Thomas to make good his defalcation, and to enable the Bank to liquidate an overdraft which it could not lawfully carry. No decision relied upon by the

Bank, nor any other decision we have found, stamps Tittle's act as illegal, nor estop him from enforcing against the Bank a valid contract. We do not believe the law will lend its aid to the Bank and save it harmless against its loss on the Brick Company account, which would have been avoided had it lived up to the agreement and thereafter conducted its affairs in accordance with the National Banking Laws.

The Bank is the plaintiff in the case, and the burden was upon it to recover. It attempted to escape the effects of an executed contract by pleading its own violations of the laws. When the fund was paid to the Bank, the contract between the Brick Company and Tittle was fully executed. Tittle did not more than ask that the Bank be forced to account for this fund by applying it to the purpose for which it had been assigned. The case would not have been different if the Brick Company had delivered the checks received by it under its contract to Tittle, and Tittle had delivered the checks to the Bank with instructions to apply the same to the payment of his note. It is wholly immaterial who carried the checks to the Bank, so long as they had been assigned for the purpose of paying the note. Under the strange doctrine the Bank seeks to invoke, it could keep and retain whatever was received, whether from Tittle or the Brick Company, dissipate it and yet enforce payment of its note. The law will not disturb an executed contract because tainted with illegality. Particularly true is this, where the party who himself has violated the law, undertakes to deprive a person innocent of guilty connection with the unlawful act, of property received under the contract.

The remaining points urged by the Bank do not contain the slightest tinge of Federal law. Both rulings attacked are supported by the overwhelming weight of both Federal and State decisions. They certainly do not present a Federal question. It is claimed that the holding that the Bank was charged with the knowledge that came to Thomas during the transaction is contrary to the holding of this Court in *American National Bank* vs. *Miller* 299 U. S. 517; 57 L. Ed. 1310. This contention might be worthy of notice if it presented a federal question and the Bank had not demonstrated beyond a doubt that the later decision of this Court in *Curtis C. & H. Co.* vs. *U. S.* 262 U. S. 315; 67 L. Ed. 956, distinguishing the *Miller* case, is directly in point and against the Bank's contention.

In the *Curtis* case Holbrook, instructed without restrictions, to procure title to Government lands, committed fraud in doing so. Likewise Thomas, an executive officer of the Bank, was entrusted without the restrictions, with the duty of collecting the overdraft, and alone acted for it in doing so by taking the note from Tittle. Therefore he was not, as was Plant in the *Miller* case, engaged in something in which his interest was plainly independent of his agency for the Bank, but as in the *Curtis* case it was to the common interest of Thomas and the Bank that the agreement be made, and that the fund be applied to the note. It was to the interest of the Bank, because it had to enforce payment of the Brick Company's overdraft, or subject itself to the severe penalties for the excessive loan. It was to the interest of Thomas because he was civilly and perhaps criminally liable on account of the overdraft. It was further to his interest so far as Tittle

knew or could ascertain, that the fund be applied to the note because he was personally liable to Tittle on his own note which would have been discharged had the Bank's note been paid. When the duty of liquidating the overdraft was entrusted to Thomas, the Bank knew of his connection with the Brick Company and of his adverse interest, if any existed, just as did the stockholders know of the adverse interest of Holbrook when they entrusted to him the duty of getting the land. The *Curtis* case and the case at bar are parallel, and incapable of distinction, and both are well supported by both Federal and State decisions.

There is no conflict between this holding and that of the Circuit Court of Appeals in *F. & D. I. Co.* vs. *Vest* 122 Fed. (2nd) 765. The unfaithful agent there was engaged in an illegal and fraudulent undertaking of his own, plainly independent of any agency of his principal. The *Vest* case falls within the holding of the *Miller* case.

That proof of the agreement did not violate the parol evidence rule is too obvious to require argument. The agreement was not plead for the purpose of varying or destroying the note, but to show that it had been paid. The Bank's counsel must not have read the *Ellington* and *Robertson* cases, nor the principal case under which the annotations in 71 A. L. R. appear. Had he done so he would have had no difficulty in finding the distinction which he probably refers to as "the fence." The distinction between the *Ellington* and *Robertson* cases is that in the *Ellington* case the Bank received, as did the Bank in Tittle's case, the proceeds of the collateral pledged by verbal agreement to secure the note sued upon; whereas the holder of

Robertson's note did not receive the collateral nor the proceeds thereof. One is a case of accord and satisfaction, whereas the other is a case of accord without satisfaction. This distinction is clearly pointed out in *Bromfield* vs. *Trinidad National Investment Co.* 36 Fed. (2nd) 646; 71 A. L. R. 542, the case under which the annotations cited on page 37 of the Bank's brief appear. To sustain its holding the Circuit Court of Appeals there cited no less an authority than the opinion of this Court in *Paine* vs. *Central Vermont Railroad Co.* 118 U. S. 152; 30 L. Ed. 193, which is also directly in point, and against the Bank's contention. The law of Texas was applicable to this question, but this is wholly immaterial for the reason that there is no conflict whatever in the Federal and State decisions on the subject.

We respectfully submit that no Federal question is involved in the case, and that the rulings made by the Supreme Court of Texas are in accordance with the decisions of the Courts of both Texas and the United States, and the petition for certiorari should be dismissed or denied.

SAM B. HALL,
CARY M. ABNEY,
SIDNEY L. HEROLD,
Counsel for Respondent

By: SIDNEY L. HEROLD.